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### Right to Be Present

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People v. Charles<sup>865</sup>  
(decided October 21, 1991)

A criminal defendant claimed that his federal<sup>866</sup> and state<sup>867</sup> constitutional rights were violated because he was deprived of his right to be present when the court provided supplemental instructions to the jury. The court held that the trial court "erred in proceeding to issue supplemental instructions to [the] jury in the defendant's absence."<sup>868</sup> The court stated that the record failed to establish that the defendant forfeited his right to be present. Furthermore, the court noted that Criminal Procedure Law (CPL) section 310.30<sup>869</sup> requires that "when a deliberating jury requests additional instructions, the court *must* return the jury to the courtroom and, after proper notice to counsel 'and in the presence of the defendant' give such requested information or instructions as the court deems proper."<sup>870</sup>

The defendant, Stephen Charles, was arrested, along with his brother Derek, for selling cocaine to an undercover police officer. They were tried jointly. During jury deliberations, Derek claimed that he was assaulted by court officers during a lunch re-

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865. 575 N.Y.S.2d 886 (2d Dep't 1991).

866. U.S. CONST. amend. VI.

867. N.Y. CONST. art. I, § 6.

868. *Charles*, 575 N.Y.S.2d at 887.

869. N.Y. CRIM. PROC. LAW § 310.30 (McKinney 1982). Section 310.30 states:

At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper. With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper.

*Id.*

870. *Charles*, 575 N.Y.S.2d at 887 (quoting N.Y. CRIM. PROC. LAW § 310.10 (McKinney 1982)) (citation omitted).

cess. As a result, his attorney informed the court that Derek could not appear for the jury's afternoon deliberations. The court instructed Derek's attorney that the jury had questions for the court and if Derek failed to appear he would waive his right to be present. However, the court eventually agreed to postpone deliberations until the following day, but warned Derek's attorney that if Derek failed to appear the jury would be instructed to deliberate despite Derek's absence. The defendant, Stephen, was present when Derek's attorney received the warning regarding his brother's nonappearance.<sup>871</sup>

That evening, Stephen was involved in an altercation with correction officers at the Brooklyn House of Detention. As a result, Stephen sustained an injury to the head. The next day Stephen failed to appear in court. His counsel informed the court of the basis for his absence and produced a doctor's note explaining Stephen's injury.<sup>872</sup> Counsel further informed the court that Stephen did not waive his right to be present just because he failed to appear. However, because of the delay in deliberations the day before, the trial court refused to postpone the proceedings any further and instructed the jury to continue deliberations. The trial court failed to make further inquiries into the circumstances surrounding Stephen's absence.<sup>873</sup>

Consequently, the trial court proceeded with the jury deliberations and, in the defendant's absence, responded to a jury note requesting instructions related to the various elements of the crimes charged. The court also spoke with some of the jurors regarding the note.<sup>874</sup>

The court, in a brief decision, reversed the trial court's

871. *Id.* at 886.

872. *Id.* at 886-87. According to the doctor's note submitted by Stephen's attorney, the defendant suffered a "hematoma of the right temporal region." *Id.*

873. *Id.* at 887; *see* *People v. Brooks*, 75 N.Y.2d 898, 899, 553 N.E.2d 1328, 1329, 554 N.Y.S.2d 818, 819 (1990) ("[B]efore proceeding in defendant's absence, the court should have made inquiry and recited on the record the facts and reasons it relied upon in determining that defendant's absence was deliberate.").

874. *Charles*, 575 N.Y.S.2d at 887.

decision and ordered a new trial. The court noted that CPL section 310.30 “‘makes a defendant’s right to be present during instructions to the jury absolute and unequivocal.’”<sup>875</sup> The court also stated that the defendant “has a constitutional right to be present under the Sixth Amendment of the United States Constitution as well as under the New York State Constitution.”<sup>876</sup>

The court then addressed the issue of whether the defendant’s absence resulted in a waiver of this right. In order for the defendant to forfeit his right to be present, he must “deliberately absent[] himself from the courtroom after [the] trial has begun . . . .”<sup>877</sup> In addition, the court noted that the court of appeals “has held that the trial court must inquire into the surrounding circumstances in order to ensure that the defendant’s absence was, in fact, deliberate.”<sup>878</sup> The court stated that the record “contain[ed] no evidence that the altercation . . . was a deliberate act on which a forfeiture of his right to be present may be predicated.”<sup>879</sup> Thus, the court found that the defendant did not knowingly forfeit his right to be present simply because he was present when his brother’s attorney was informed that the court would proceed without further delay.<sup>880</sup>

The United States Supreme Court, in *Snyder v.*

875. *Id.* (quoting *People v. Mehmedi*, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1987)); *see also* *People v. Ciaccio*, 47 N.Y.2d 431, 437, 391 N.E.2d 1347, 1350, 418 N.Y.S.2d 371, 373 (1979) (“When the court communicates with a jury, they must be returned to the courtroom, the prosecutor and counsel for the defendant must be notified, and the defendant must be present.”).

876. *Id.*; *see Ciaccio*, 47 N.Y.2d at 436-37, 391 N.E.2d at 1350, 418 N.Y.S.2d at 373 (“[T]he presence of the defendant and his counsel is constitutionally required whenever supplemental instructions are given . . . .”); *People v. Cain*, 76 N.Y.2d 119, 124, 556 N.E.2d 141, 143, 556 N.Y.S.2d 848, 850 (1990) (The court noted that *Ciaccio* “concluded that the presence of the defendant and his counsel during supplemental instructions is constitutionally . . . required.”).

877. *Charles*, 575 N.Y.S.2d at 887.

878. *Id.* (citing *People v. Brooks*, 75 N.Y.2d 898, 899, 553 N.E.2d 1328, 1329, 554 N.Y.S.2d 818, 819 (1990)).

879. *Id.*

880. *Id.*

*Massachusetts*,<sup>881</sup> recognized that the presence of the defendant is required if “[i]t bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend.”<sup>882</sup> The Court explained that this right is conditioned “to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”<sup>883</sup> Thus, the *Snyder* Court cautioned that due process would not be extended to require the defendant’s presence “when [his] presence would be useless, or the benefit but a shadow.”<sup>884</sup>

In construing *Snyder*, in *Larson v. Tansy*,<sup>885</sup> the Tenth Circuit held that the “defendant’s presence in the courtroom during the instructing of the jury . . . would not have been useless [because the] defendant’s presence might have allowed him to provide assistance to his counsel.”<sup>886</sup> In *United States v. Fontanez*,<sup>887</sup> the Second Circuit held that the defendant’s exclusion from jury instructions violated his right to be present throughout his trial. As a result, the *Fontanez* court reasoned that the defendant’s exclusion “deprived [him] of the ‘psychological function’ of his presence on the jury during a crucial phase of his trial.”<sup>888</sup> Additionally, in *Akins v. Cardwell*,<sup>889</sup> the Ninth Circuit concluded that “the reading of the court’s instructions to the jury at the jury’s request and in the absence of the defendants” constituted prejudicial error requiring a new trial.<sup>890</sup>

Although the defendant has the right to be present during jury instructions, this right may be waived by the defendant’s absence.

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881. 291 U.S. 97 (1934).

882. *Id.* at 106.

883. *Id.* at 107-08; *see also* *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (The defendant is only “guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.”).

884. *Snyder*, 291 U.S. at 106-07.

885. 911 F.2d 392 (10th Cir. 1990).

886. *Id.* at 395.

887. 878 F.2d 33 (2d Cir. 1989).

888. *Id.* at 38.

889. 500 F.2d 47 (9th Cir. 1974).

890. *Id.* at 47.

In *United States v. Sanchez*,<sup>891</sup> the court stated that “[i]t has long been settled that a defendant charged with a crime may knowingly and voluntarily waive his constitutional right to be present . . . .”<sup>892</sup> However, in order for the proceedings to continue in the defendant’s absence, “[i]t must clearly appear in the record . . . that the defendant was advised when the proceedings were to commence and that he voluntarily, knowingly, and *without justification* failed to be present at the designated time and place . . . .”<sup>893</sup>

The *Charles* decision comports with both federal and current New York State jurisprudence on the issue of the defendant’s right to be present when a deliberating jury requests additional instructions from the court. In *People v. Ciaccio*,<sup>894</sup> the New York Court of Appeals stated that “[i]n every criminal proceeding, a defendant has an absolute right to be present . . . ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’”<sup>895</sup> The *Ciaccio* court held that the defendant’s presence “is constitutionally required whenever supplemental instructions are given [to the jury].”<sup>896</sup> The court emphasized the importance of the

891. 790 F.2d 245 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986).

892. *Id.* at 248; *see Taylor v. United States*, 414 U.S. 17, 20 (1973) (voluntary absence from ongoing trial constitutes waiver of right to be present).

893. *Sanchez*, 790 F.2d at 249 (emphasis added) (quoting *United States v. Tortora*, 464 F.2d 1202, 1209 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); *see also Taylor*, 414 U.S. at 19 n.3 (defendant may voluntarily waive his right to be present at trial, but court must clearly establish voluntariness); *Polizzi v. United States*, 926 F.2d 1311, 1319 (2d Cir. 1991) (court must make factual determination on record regarding whether defendant’s absence was made knowingly and voluntarily); *United States v. Mera*, 921 F.2d 18, 20 (2d Cir. 1990) (“The trial judge in his sound discretion determines whether a defendant’s absence constitutes a waiver . . . . The district court must determine: 1) whether the defendant’s absence is knowing and voluntary, . . . and 2) whether ‘the public interest . . . clearly outweighs that of the voluntarily absent defendant . . . .’” (citations omitted)).

894. 47 N.Y.2d 431, 391 N.E.2d 1347, 418 N.Y.S.2d 371 (1979).

895. *Id.* at 436, 391 N.E.2d at 1349, 418 N.Y.S.2d at 373 (quoting *Snyder*, 291 U.S. at 105-06).

896. *Id.* at 436-37, 391 N.E.2d at 1350, 418 N.Y.S.2d at 373.

supplementary instructions, noting that they “com[e] after the jury has already once retired, [and] they may well be determinative of the outcome of the case . . . .”<sup>897</sup> The *Ciaccio* decision has been followed consistently by the New York courts.<sup>898</sup>

In *People v. Sanchez*,<sup>899</sup> the court of appeals followed the *Taylor* rule and stated that “a defendant [who] deliberately leaves the courtroom after his trial has begun, . . . forfeits his right to be present . . . regardless of whether he knows that the trial will continue in his absence.”<sup>900</sup> Thereafter, in *People v. Brooks*,<sup>901</sup> the court of appeals held that “[b]efore proceeding in defendant’s absence, the court should . . . ma[ke] [an] inquiry and recite[] on the record the facts and reasons it relied upon in determining that defendant’s absence was deliberate.”<sup>902</sup> Thus, the defendant may

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897. *Id.* at 436, 391 N.E.2d at 1350, 418 N.Y.S.2d at 373. The court noted that jury instructions require the court “to state the fundamental legal principles applicable to criminal cases generally, as well as the material legal principles applicable to a particular case and the application of the law to the facts.” *Id.*

898. *See People v. Cain*, 76 N.Y.2d 119, 123-24, 556 N.E.2d 141, 143, 556 N.Y.S.2d 848, 850 (1990) (quoting *Ciaccio* on defendant’s right to be present during supplemental instructions to single juror); *People v. Mehmedi*, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1987) (*Ciaccio* “makes a defendant’s right to be present during instructions to the jury absolute and unequivocal.”); *People v. Marling*, 572 N.Y.S.2d 209, 209 (4th Dep’t 1991) (providing further instructions to jury without defendant present violates defendant’s constitutional right to be present); *People v. Saunders*, 165 A.D.2d 784, 785, 564 N.Y.S.2d 57, 58 (1st Dep’t 1990) (giving instructions to jury constitutes material stage and requires defendant’s presence), *appeal denied*, 77 N.Y.2d 882, 571 N.E.2d 95, 568 N.Y.S.2d 925 (1991).

899. 65 N.Y.2d 436, 482 N.E.2d 56, 492 N.Y.S.2d 577 (1985).

900. *Id.* at 443-44, 482 N.E.2d at 59-60, 492 N.Y.S.2d at 580-81; *see also People v. Amato*, 172 A.D.2d 545, 545, 567 N.Y.S.2d 873, 874-75 (2d Dep’t 1991) (defendant who deliberately absents himself from courtroom forfeits right to be present).

901. 75 N.Y.2d 898, 553 N.E.2d 1328, 554 N.Y.S.2d 818 (1990).

902. *Id.* at 899, 553 N.E.2d at 1329, 554 N.Y.S.2d at 819; *see also Amato*, 172 A.D.2d at 545, 567 N.Y.S.2d at 875 (“[T]he court has an obligation to inquire into the surrounding circumstances to determine if the defendant’s absence is deliberate and to recite on the record the reasons for its finding.”); *People v. Badia-Almonte*, 161 A.D.2d 1199, 1199, 555 N.Y.S.2d 974, 975 (4th Dep’t) (court inquired into surrounding circumstances regarding

forfeit “his right to be present during the delivery of the additional instructions [to the jury] by leaving the courthouse during deliberations despite instructions to remain in the building.”<sup>903</sup>

Under both the federal and state constitutions, the defendant has a right to be present during supplemental jury instructions by the court. However, this right may be forfeited if the defendant deliberately absents himself from the proceedings. Thus, before the court may proceed with the supplemental jury instructions it must make a finding, based on the surrounding circumstances, that the defendant’s absence is, in fact, deliberate.

#### FOURTH DEPARTMENT

People v. Williams<sup>904</sup>  
(decided February 1, 1991)

A criminal defendant claimed that his right to be present at all material stages of his trial, pursuant to the confrontation clauses of the federal<sup>905</sup> and state<sup>906</sup> constitutions, was violated when his trial was held in his absence. The court held that the “defendant’s non-appearance constituted a waiver of his right to be present at trial.”<sup>907</sup> Thus, the defendant’s conviction of grand larceny in the third degree was affirmed.<sup>908</sup>

On May 5, 1988, the trial court informed the defendant, Albert Williams, that his trial would be conducted eleven days later.<sup>909</sup> The court further informed Williams that his presence was required, but that the trial would proceed in his absence should he

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defendant’s absence before proceeding with trial), *appeal denied*, 76 N.Y.2d 852, 561 N.E.2d 891, 560 N.Y.S.2d 991 (1990).

903. *People v. Watson*, 121 A.D.2d 487, 487, 503 N.Y.S.2d 584, 585 (2d Dep’t 1986).

904. 170 A.D.2d 968, 566 N.Y.S.2d 135 (4th Dep’t), *appeal denied*, 77 N.Y.2d 968, 573 N.E.2d 590, 570 N.Y.S.2d 502 (1991).

905. U.S. CONST. amend. VI.

906. N.Y. CONST. art. I, § 6.

907. *Williams*, 170 A.D.2d at 969, 566 N.Y.S.2d at 136.

908. *Id.* at 968, 566 N.Y.S.2d at 137.

909. *Id.* at 968, 566 N.Y.S.2d at 136.